FILE COPY

FEB 13 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER,
PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
AS TRUSTEES OF GORDON-CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, RESPONDENTS.

PETITIONER'S REPLY

REUEL B. COOK,
EDMOND M. COOK,
of Davenport, Iowa
M. S. GUNN,
of Helena, Montana
Counsel for Petitioner.

SUBJECT INDEX

	Page
Status of corporation not procedural nor remedial	1
Question is not whether respondents' judgment is void or voidable	2
Respondents were parties in lower court	3
State cannot enlarge powers of foreign corporation nor alter charter provisions for its control or management	4
Corporations were not dissolved in cases under respondents' point VI	4
Fiction of corporate life is under control of the creating state	4
State cannot keep foreign corporation alive until its contracts have been performed	6
Iowa statutes impose powers and duties of liquidating trustee on successor to Federal Surety Company	9
Not necessary that corporate successor be State officer nor be called a liquidator	10
Iowa Court has not distinguished or limited the case of Relfe v. Rundle	10
Conclusion	11
Appendix	12-29

CASES CITED

	Page
Andrews v. Andrews, 188 U. S. 14; 47 L. Ed. 366	9
Castle v. Arrogen Coal Co., 145 Ky. 591; 140 S. W. 1021	8
First National Bank of Selma v. Colby, 21 Wall. 609; 22 L. Ed. 687	5
Fitts v. National Life Assn. of Hartford, 139 Ala. 413; 30 S. 374	5
Hanger v. International Trading Co., 184 Ky. 791; 211 S. W. 138	8
Life Assn. v. Fassett, 102 Ill. 315	9
McGoon v. Scales, 9 Wall. 23; 19 L. Ed. 545	7
Mutual Life Ins. Co. v. Cohen, 179 U. S. 262; 45 L. Ed. 181	5
Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257; 71 L. Ed. 631	4, 5
Olds v. City Trust etc. Co., 185 Mass. 500; 70 N. E. 1022	8
Ransom v. Williams, 2 Wall. 313; 17 L. Ed. 803	11
Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337	4, 5, 10
Remington v. Samana Bay Co., 140 Mass. 491; 5 N. E. 292	4
Riddell v. Rochester German Ins. Co., 35 R. I. 15; 85 A. 273	4
Rogers v. Adriatic F. Ins. Co., 148 N. Y. 31; 42 N. E. 515	9
Schloss v. Met. Surety Co., 149 Ia. 382, 128 N. W. 381	10
Singer v. Hutchinson, 83 Ill. App. 675; 183 Ill. 606	8
State v. Fidelity Loan Co., 113 Ia. 439; 85 N. W. 628	11
Sterret v. Second National Bank, 248 U. S. 73; 63 L. Ed. 135	9
Stetson v. New Orleans City Bank, 2 Ohio St. 167; 12 Ohio St. 577	7
Williams v. Gaylord, 186 U. S. 157; 46 L. Ed. 1102	4

47 C. J., Sec. 221, p. 116 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER,
PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, RESPONDENTS.

REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF

We shall reply very briefly to some of the propositions argued by respondents, following their subdivisions.

I.

Whether the corporation was dead in Montana is not procedural nor does it pertain to the remedy.

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257; 71 L. Ed. 634;

where Chief Justice Taft, speaking of this, says:

> "The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being."

And other cases cited under Brief Point III Petitioner's Supplemental Brief.

II.

The Montana Court had before it for decision the status of respondents' judgment, their execution under this judgment, and their levy under this execution; for respondents' right to appeal depended solely upon their having a valid judgment, a valid execution, and a valid levy.

The Montana decision is, not that respondents' judgment is voidable and not open to collateral attack, but that it is a valid judgment, not even open to direct attack. (R. 77, last Par.)

What the Montana Court decided is, that at common law no valid, personal judgment can be had against a dissolved corporation; but that the Montana statutes keep all foreign corporations alive for purposes of suit, and it follows that suits may be begun against foreign corporations after their final dissolution at home.

The question whether a judgment entered against a dissolved corporation in a suit begun before its dissolution is void or voidable; whether it may be attacked collaterally or only directly, is not here involved.

However, we understand the common law rule as to a dissolved corporation to be that not only does the suit abate but the debt or claim upon which it rests abates, and that any personal judgment thereafter entered against it is a nullity, absolutely void.

This was argued in the Montana court and the court held that this was the common law rule. It then further held, not that a cause of action against the dissolved corporation survived dissolution; but that the Montana Court (because of Montana statutes) would not recognize the dissolution.

While we do not believe the question whether a judgment entered against a dissolved corporation in a suit begun before its dissolution is void or voidable is before this court, we have examined it. Respondents, to support their contention that such a judgment cannot be collaterally attacked, cite only text-writers.

In an appendix hereto we set out an analysis of the cases cited in support of the text.

III.

Counsel argues that respondents did not become parties to proceedings in the lower court.

If they did not, they had no right to appeal. The fact that their appeal was entertained conclusively establishes their status as parties. They obtained an adjudication that their judgment is valid.

Counsel also argue under this subdivision that the Supreme Court held that the District Court had no jurisdiction of the proceeding.

Counsel are mistaken about this.

Mieyr in his complaint asked for judgment against Federal Surety Co. and Clark, Receiver, for Two Thousand Seven Hundred Forty-two and 70/100 ($2,742.70) Dollars, interest and costs, and for appointment of a receiver and other relief. (R. 7)

The Supreme Court held the appointment of a receiver was erroneous. It did not hold that the court was without jurisdiction of the proceeding.

Should the decision of the Montana Supreme Court stand, the proceeding would still remain pending on plaintiff's prayer for judgment, and under the decision of the Montana Supreme Court he would be entitled to judgment on the face of his complaint.

An intervenor must take the case as he finds it.

47 C. J., Sec. 221, p. 116.

V.

Conceded that an insurance corporation is not engaged in interstate commerce.

That a state may exclude a foreign insurance company.

That it may restrict the exercise of its powers and impose conditions upon its admission.

But it cannot give it additional powers or attributes nor alter the provisions which have been made in its charter for the control and management of its affairs.

Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 337;
Riddell v. Rochester German Ins. Co., 35 R. I. 45; 85 A. 273.

VI.

Every case cited by respondents under this subdivision is a case where a statute *of the domicile of the corporation* continued it after dissolution for the purpose of winding up its affairs. There could be no substitution. The corporations were alive. The cases mean nothing in this proceeding.

VII.

Here respondents seek to limit the doctrine of *Relfe v. Rundle*.

They cite one case, viz. *Williams v. Gaylord*, 186 U. S. 157; 46 L. Ed. 1102, as having this effect.

This case only holds that a state may *restrict* the powers of a foreign corporation transacting business within its jurisdiction. It further holds that the state has no power to regulate the organization or internal government of a foreign corporation.

Respondents argue that the "death" of a corporation is only a rule of expediency and that by the Montana statutes the corporate life, a mere fiction, is not legislated upon.

The Supreme Court of Massachusetts has spoken about this in *Remington v. Samana Bay Co.*, 140 Mass. 494; 5 N. E. 292.

That Court says:

> "It is true that the existence of a corporation is a fiction, but the very meaning of that fiction is that the liability of its members shall be determined as if the fiction were the truth. That fiction or artificial creation is *wholly within the power of its creator*" (our italics) "and persons who deal with it must be taken to understand that it is so."

VIII.

Respondents here assert that "Montana has not undertaken to say that a dissolved foreign corporation is alive in Montana. It has only said that it remains suable."

This is a distinction without a difference. The one includes the other. Without a defendant there is no issue before the court.

In *Oklahoma Natural Gas Co. v. State of Oklahoma*, 273 U. S. 257; 71 L. Ed. 634, Chief Justice Taft, speaking of the effect of corporate dissolution, says:

> "To allow actions to continue would be to continue the existence of the corporation pro hac vice."

In *Fitts v. National Life Assn. of Hartford*, 130 Ala. 413; 30 S. 374, treating the right to sue a dissolved foreign corporation, the Alabama court says:

> "It would be a doctrine new to the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."

In *First National Bank of Selma v. Colby*, 21 Wall. 609; 22 L. Ed. 687, Mr. Justice Field, speaking of the right to sue a dissolved corporation, and statutory provisions as to survival and revivor of suits against an individual, says:

> "No such provision exists as to corporations, nor, indeed, could exist without reviving the corporation pro hac vice."

Under this subdivision respondents say:

> "While the facts in *Relfe v. Rundle* are easily distinguishable from the case at bar, the doctrine therein announced has been refused application in other cases where the law of the forum was different. *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262; 45 L. Ed. 181."

So far is this case from refusing application of the doctrine of *Relfe v. Rundle* that it by necessary implication approves that doctrine.

A New York insurance company wrote a life insurance policy in Montana. The assured died while certain premiums were unpaid. Suit was brought on the policy in the United States Circuit Court for the District of Washington. The defense was non-payment of premiums that came due.

The statutes of Montana contained no provision requiring the insurer to give the assured notice of premiums coming due. The New York statutes provided that no policy should be forfeited or lapsed for non-payment of premiums until notice that premium was due.

The sole question was whether the New York law or the Montana law governed.

Before deciding this question this Court inquired whether the New York statute involved was a part of the charter of the New York corporation and found that it was not. The court then, and not until then, held that the law of Montana, where the contract was made, governed and the policy lapsed.

The implication is clear that if the New York statute was a part of the corporate charter it would govern; else why the inquiry.

IX.

Under this subdivision respondents argue that a state may by statute provide that a foreign corporation shall remain subject to suit indefinitely until its contracts have been performed.

This is no doubt true so long as the foreign corporation is alive. Respondents, however, seek to extend the rule to a finally dissolved foreign corporation and cite authorities which, as we understand them, do not so decide.

Counsel first quote *Fletchers Enc. Corp.*, Vol. 8, p. 9720, to the effect that the legislature of a state may provide that a foreign corporation which has been dissolved, but which owns property and owes debts in such state, may be sued and the property subjected to the payment of such debts, and that legislation was held constitutional by the Supreme Court of the United States and citing:

McGoon v. Scales, 9 Wall. 23; 19 L. Ed. 545.

This case involved the validity of an attachment proceeding in Wisconsin under which lands of an Illinois corporation were sold in Wisconsin. A proceeding in rem.

There was some claim that the Illinois corporation had been finally dissolved. But the case never involved the right to take personal judgment against a dissolved corporation.

But more than that. The charter of the Illinois Bank was revoked by an act of the Illinois Legislature which provided for trustees to wind up its affairs and provided:

> "The real estate of said Bank shall be liable to taxation and sale on execution in the same manner as the property of individuals."

This might well be held to continue the existence of the corporation for the purpose of proceedings against it to subject its real estate to its debts, and apparently this Court took that view, for it said:

> "It is by no means certain that the Bank had no capacity to sustain a suit, notwithstanding the expiration of its charter and the transfer of its property to trustees."

Furthermore, the trustees appeared in the attachment proceedings.

The case is certainly not authority for the proposition that personal judgment may be taken against a finally dissolved foreign corporation; nor authority for the proposition that when a charter provision says its property shall go to trustees, for the equal protection and benefit of creditors and stockholders, such property may be taken on execution for the benefit of one creditor.

Respondents then cite seven cases which they claim support their contention. (One case is cited twice.)

Stetson v. New Orleans City Bank, 2 Ohio St. 167; 12 Ohio St. 577.

A Louisiana corporation assigned its property. Its charter then expired. The Ohio Court permitted the assignee to sue

in the name of the dissolved corporation. A very different thing from permitting the dissolved corporation to sue in its own behalf.

Hanger v. International Trading Co., 184 Ky. 794; 214 S. W. 438.

This is the only case which respondents cite or we have been able to find which holds that a statute can keep alive a finally dissolved foreign corporation.

The court says:

> "The common law rule that the debts and liabilities of a corporation are extinguished by its dissolution has been changed by statute which applies to domestic, and also to foreign corporations *having their principal place of business in this state*, and continues their legal existence for the purpose of winding up their affairs."

The proposition is announced, but not reasoned nor discussed. It certainly is not binding on this court and should have been reversed had it been brought here.

Singer v. Hutchinson, 83 Ill. App. 675; 183 Ill. 606.

This case dealt with a domestic corporation, organized under the laws of Illinois.

Castle v. Acrogen Coal Co., 145 Ky. 591; 140 S. W. 1034.

Defendant, a West Virginia corporation, was continued by domiciliary statute. The Kentucky decision that it was continued by statute of the forum is dictum.

Olds v. City Trust etc. Co., 185 Mass. 500; 70 N. E. 1022.

This is a proceeding in rem.

The court held that it would not recognize the dissolution of a New York corporation by decree of a New York court, in the absence of any proof of a New York statute authorizing

such a dissolution. This is all the court decided. There is some dictum in the opinion.

Rogers v. Adriatic F. Ins. Co., 148 N. Y. 34; 42 N. E. 515.

The New York court held it would not recognize an Illinois judgment against a New York corporation finally dissolved in New York. Anything said as to the right of Illinois to enter such a judgment is pure dictum.

Life Assn. v. Fassett, 102 Ill. 315.

The Court found that a Missouri corporation had not been finally dissolved and was still in existence in Missouri and affirmed a judgment against it on that ground. The opinion discusses the effect of an Illinois statute in keeping the foreign corporation alive in Illinois and says it does not see why it should not; but it does not decide the case on this ground.

Andrews v. Andrews, 188 U. S. 14; 47 L. Ed. 366.

Cited for some purpose, at the end of this division, is a divorce case. It has nothing to do with any proposition involved here.

XII.

There can be no doubt the Iowa statutory charter provision imposed a trust for the equal benefit of creditors upon the successor (call him what you will) of Federal Surety Company.

The cases presented by Respondent under this heading all involved corporations which had not been finally dissolved; they remained in existence either because the statute did not provide for dissolution or because as in *Sterret v. Second National Bank*, 248 U. S. 339, the courts of the domicile had so construed the domiciliary statute. Where, as in this case, the corporate existence is irretrievably ended, it can no longer hold the title and the statute imposes the duty upon its successor to liquidate and distribute the assets.

It matters little whether we say this trustee had title, or had power to carry out the trust.

He is not a chancery receiver, for there is no such thing known to chancery as a receiver for the property of a dead man or a dissolved corporation.

XIV. and XV.

Respondents here point out that Federal Surety Company entered Montana before the Iowa statute requiring that the Iowa Superintendent of Insurance be the receiver and or liquidating officer for insurance companies was enacted.

We have not argued that the statutory successor of the dissolved corporation holds as a trustee the assets formerly owned by it because he is a state officer.

The statutory charter provisions fix the character of such statutory successor and clothe him with the powers and duties of a liquidator and not of a receiver and make him a trustee holding the assets of the dissolved corporation for the equal benefit of its creditors, whoever he may be. It is highly proper he should be a state officer; but the rules we assert do not depend upon it.

XVI.

Respondents here say that in

Schloss v. Met. Surety Co., 149 Ia. 382, 128 N. W. 384,

is found a complete analysis of this very situation and that the Iowa Court differentiates *Relfe v. Rundle*.

If this were true, it would not be binding on this Court.

But the fact is that in this case the questions presented here were never raised.

The case was decided in the lower court on demurrer to an answer which, so far as the opinion discloses, did not plead the statutes of New York.

The defense was not and could not be based on the charter provision of the defendant corporation for no charter provisions were pleaded.

Under this heading respondents' counsel attach significance to the fact the Iowa Court designated petitioner as "Receiver"

and not as "Liquidating Officer." It may be inferred the Iowa Court advisedly selected the term "Receiver" because the Iowa Supreme Court in *State v. Fidelity Loan Co.*, 113 Ia. 439, had previously held that dissolution and appointment of a *Receiver* put an end to a corporation for all purposes. That holding certainly makes the Receiver in such cases more than a mere officer of court.

CONCLUSION

Regardless of the validity of respondents' judgment their execution levy is invalid. *See Ransom v. Williams*, 2 Wall. 313; 17 L. Ed. 803.

Moreover, every contract creditor of the dissolved corporation agreed when he dealt with it that should it become insolvent and its assets insufficient to pay all creditors in full, such assets should go to a trustee representing all the creditors for their equal benefit and to be liquidated and distributed pro rata among all creditors.

No creditor can repudiate that agreement and seize property so passing to such trustee for his own benefit.

If he holds a valid judgment, this may liquidate his claim to be filed with the trustee; but it cannot permit him to seize the trust property on an execution issued under it.

Upon the final dissolution of the corporation its property passed from it and is no longer property of the corporation. It cannot, after dissolution, be seized as the property of the corporation, for it is no longer such.

REUEL B. COOK,
EDMOND M. COOK,
M. S. GUNN,
Counsel for Petitioner.

APPENDIX

Respondents (Page 4, Supplemental Brief) say that the dissolution of Federal Surety Company in Iowa was not suggested and did not appear of record in their Fergus County law action, and that therefore their judgment is not void but is voidable only and impervious to collateral attack. Their Brief cites no court decisions, but quotes only from Corpus Juris and Ruling Case Law. Those texts also recognize the rule that a judgment rendered after death is by many authorities held to be utterly void. The text, insofar as it holds that a judgment after death is voidable only, is not supported by most of the authorities in the footnote.

At Pages 2 and 3 of this Brief we demonstrate that the Montana decision does not involve suryival of actions. The Montana Court says there was no corporate death to be survived; they say the corporation did not die in Montana.

If the Montana Court had held that the judgment was voidable only and therefore impervious to collateral attack, then the Iowa Commissioner could have proceeded with a direct attack. But the Montana decision forever blocks a direct attack because it says the corporate existence was not terminated and that respondents' action proceeded to valid judgment against an existing corporation. It is that holding we complain of.

Nevertheless respondents have raised the question that their judgment is good on its face and cannot be collaterally attacked. While we do not believe the question is here involved, we recognize that the texts and supporting decisions are in serious confusion. For such use as it may be to the Court, we have analyzed approximately one hundred of the decisions cited in the footnotes to the text and hereinafter set out our analysis somewhat at length.

There is no case which holds that judgment against a finally dissolved corporation is voidable only. Therefore, the decisions relating to judgments against individuals are valuable only by analogy, which is not in point in view of the decisions passing on judgments against finally dissolved corporations. There are

cases which say that such a judgment is utterly void and which have said so on collateral attack.

Pendleton v. Russell, 144 U. S. 640; 36 L. Ed. 574;
Marion Phosphate Co. v. Perry, 74 Fed. 425;
Remington v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292.
Crossman v. Vivienda Water Co. (Calif.), 89 P. 335;
New Hall v. Western Zinc Co. (Calif.), 128 P. 1040;

Even though the rule be as contended by respondents, it is subject to a well-recognized exception. The rule against collateral attack only precludes proof of facts not appearing in the record, but when those facts are undisputed or are admitted the court will pass on the validity of the judgment.

Hill v. City Cab Co. (Calif.), 21 P. 728;
Akley v. Basset (Calif.), 209 P. 576 at 581.

By their stipulation (R. 65) appellants admit the facts which render their judgment a nullity and absolutely void, but say to the court that notwithstanding such admission they should be permitted and assisted by virtue of that void judgment to gain a preference over other creditors of the same class.

Proceeding to the texts which respondents cite, we find that the text in 33 C. J. 1107 recognizes and states:

> "A judgment rendered for or against a party after his death, according to numerous decisions, is utterly void, and as such subject to collateral attack."

Those texts only say that the numerical weight of authority is the other way. The following analysis is to demonstrate that the numerical weight of authority holds that judgment after death is absolutely void even though the court had acquired jurisdiction before death.

We have also analyzed forty-seven decisions which are cited by the Corpus Juris text as supporting the rule that the judgment was absolutely void, even though the court acquired jurisdiction of the defendant before death. We have eliminated all of those decisions which are purely dictum and which did not squarely involve the point, and find that there are decisions

from nine courts which squarely and necessarily decided the question and which held that the judgment was absolutely void. We present the following eighteen citations from those nine courts as supporting our position.

Alabama	Meyer v. Hearst, 75 Ala. 390.
	Swink v. Snodgrass, 17 Ala. 653, 52 Am. D. 190.
Arkansas	Jacobsen v. Campbell, 12 S. W. 784.
Indiana	Bivens v. Henderson, 42 Ind. A. 562, 86 N. E. 426.
Kansas	Kager v. Vickery, 61 Kan. 342, 59 P. 628, 78 Am. S. R. 318, 49 L. R. A. 153.
Louisiana	Edwards v. Whited, 29 La. Ann. 647.
	McCloskey v. Wingfield, 29 La. Ann. 744.
	Norton v. Jamison, 23 La. Ann. 102.
	New Orleans etc. R. Co. v. Bosworth, 8 La. Ann. 80.
Mississippi	Weis v. Aaron, 75 Miss. 138, 21 S. 763, 65 Am. S. R. 594.
	Parker v. Horne, 38 Miss. 215.
Missouri	Cole v. Parker-Washington Co., 276 Mo. 220, 207 S. W. 749.
New York	Requa v. Holmes, 16 N. Y. 193.
	Requa v. Holmes, 26 N. Y. 338.
	Arents v. Long Island R. Co., 36 App. Div. 379, 55 NYS 401.
	People v. Bellando, 137 App. Div. 777, 122 NYS 543.
Tennessee	Morrison v. Deaderick, 10 Humphr. 342.
	Kelly v. Hooper, 3 Yerg. 395.

The foregoing cases are squarely in support of the proposition that a judgment is utterly void if rendered after death, even though jurisdiction was acquired before death. The re-

maining cases, more than thirty in number, are not relevant to the discussion. Attention is directed especially to the following two cases, which contain each a very learned discussion of the entire subject and demonstrate the source and nature of the misapprehension that exists on this subject:

Cole v. Parker-Washington Co., 276 Mo. 220, 207 S. W. 749;

Kager v. Vickery, 61 Kan. 342, 59 P. 628, 78 Am. S. R. 318, 49 L. R. A. 153.

The text that such a judgment is voidable only is supported by decisions from eight courts instead of twenty-three as the footnote pretends. The decisions from the other fifteen courts contain discussions which are dictum or may be distinguished as shown by the following analysis.

The sixty-six decisions examined by us and cited in support of the text that the judgment is voidable only may be summarized as follows:

8 DECISIONS BY 6 COURTS
IN POINT — SUPPORT THE TEXT.

1 DECISION BY 1 COURT
IN POINT — BASED ON SURVIVAL STATUTES.

This case recognizes the common law rule and holds that it has been changed by survival statutes in its particular jurisdiction.

5 DECISIONS BY 1 COURT
IN POINT — TEXAS DECISIONS.

The Texas court has departed from all basic principles in considering this subject and has even held that judgment is not void though the defendant was dead when the action was commenced:

4 DECISIONS
DISTINGUISHED — JUDGMENT FOR DEAD PLAINTIFF OR DEFENDANT.

These are not authority for upholding judgment against

a dead defendant. Judgment *for* a dead party may be upheld on the ground that he assented to it; whereas, judgment against a dead party totally lacks vitality, 1st, because he did not assent to it, and 2nd, because there was no one before the court upon whom judgment in personam could be enforced.

13 DECISIONS
DISTINGUISHED — DID NOT INVOLVE JUDGMENT FOR OR AGAINST DEAD PARTY OR DID NOT INVOLVE THE POINT UNDER CONSIDERATION.

These cases dealt with extraneous subjects, such as, judgments against insane persons.

16 DECISIONS
DICTUM — DIRECT ATTACK.

Facts required only a holding that the judgment under consideration was voidable and did not call for a decision that the judgment was void.

4 DECISIONS
DICTUM — NUNC PRO TUNC ENTRY UPHELD.

In each of these cases trial was had during lifetime, and after death judgment entered as of the day of trial. These cases are not applicable because such nunc pro tunc entries have been upheld on the theory that the representatives of a party should not be prejudiced where the delay is occasioned by the court due to press of other matters or for other reasons.

5 DECISIONS
DICTUM — ESTOPPEL OF OPPOSITE PARTY.

In each of these cases some fact was found which estopped the opposite party from raising the point, and, therefore, the discussion of the question, void or voidable, is dictum.

3 DECISIONS
DICTUM — ATTACK BARRED BY STATUTE OF LIMITATION.

There are statutes which limit the time within which

even a void judgment may be attacked. These cases involve such a statute. Discussion of the question, void or voidable, was unnecessary.

2 DECISIONS
DICTUM — PLAINTIFF IN ERROR DIED PENDING APPEAL.

As stated by Justice Story in *Green v. Watkins*, 18 U. S. 260, death of plaintiff in error pending appeal has never abated the appeal where the judgment below was rendered before death.

1 DECISION
DICTUM — JOINT PARTIES.

Involves facts where the surviving parties had capacity in the absence of the dead party to prosecute or defend.

1 DECISION
DICTUM — PARTY DEAD WHEN ACTION COMMENCED.

With the exception of Texas courts, it has been universally recognized that a judgment in such a case is utterly void. Nevertheless, in deciding such cases some courts discussed the question of void or voidable. That discussion under those circumstances was purely dictum.

3 DECISIONS
IN POINT — HOLDING OPPOSED TO THE TEXTS OR OVERRULED BY LATER DECISION.

We proceed now to an analysis of each of the cited cases.

New Orleans v. Gaines, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102
Distinguished — does not involve the point.

The City of New Orleans appealed to this Court from several judgments against it. Other actions had been commenced and decrees obtained against individual defendants for the same causes of action. For the City it was urged that several of the decrees in those separate actions had been rendered after the deaths of the defendants therein and were therefore subject to attack. This Court

held that the cause of action against the City was not dependent on the validity of those decrees against the individuals, and therefore this Court did not decide the question whether those judgments or decrees against the individuals were void or voidable.

Coughlin v. Dist. of Columbia, 106 U. S. 7, 1 S. Ct. 37, 27 L. Ed. 74
Distinguished — decided on another point.

Plaintiff died after an appeal to this Court from an order of the General Term in the District of Columbia which had set aside a judgment in his favor. His administrator continued the appeal. This Court reversed the order of the General Term and ordered that the judgment in favor of plaintiff be affirmed as of its original date of entry in order to prevent abatement. That case does not even discuss and in no way involves the question whether the judgment in favor of the plaintiff was void or voidable and in no way supports the text.

Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369
Dictum — entry nunc pro tunc.

Suit in Ohio on an Iowa judgment. The defendant in the Ohio suit attacked the Iowa judgment because it had been rendered for plaintiff after plaintiff's death but nunc pro tunc as of the day of trial, which had taken place during plaintiff's lifetime. This Court upheld the Iowa judgment and approved the entry nunc pro tunc on the ground that the rights of a party litigant or his representatives should not be prejudiced by a delay occasioned by the court due to press of other matters or for other reasons.

Todhunter v. Klemmer, 134 Cal. 66, 66 P. 75
In point — supports the text.

Wallace v. Center, 67 Cal. 133, 7 P. 441
In point — supports the text.

Phelan v. Tyler, 64 Cal. 80, 28 P. 114
Dictum — direct attack.

Involved only the death of a plaintiff in error pending an

appeal. Judgment of the appellate court was directly attacked so that language in the opinion is dictum. Case also is governed by the rule, announced in Green v. Watkins, 18 U. S. 260, by Justice Story, that death of plaintiff in error does not abate the appeal.

Parsons v. Parsons, 70 Colo. 154, 198 P. 156
Distinguished — decided on another point.

California divorce decree does not become final until six months after entry. Defendant died after the decree but before the six months expired. Held that the findings of fact in the original entry determined the status of the parties. Discussion of the void-voidable question was not essential to the decision.

Cochrane v. Parker, 12 Colo. A. 169, 54 P. 1027
Dictum — plaintiff in error died pending appeal.

Collins v. Mitchell, 5 Fla. 364
Dictum — estoppel of opposite party.

Collateral attack. Action on a release bond. Point raised that judgment against the principal on the bond was void. Court held that the surety, by signing the bond at a time when the fact of death was known to him, was estopped to raise that question.

Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. S. R. 263
Dictum — direct attack.

The attack on this judgment was made in the proceeding where it was rendered. Therefore, the only decision required was that the judgment was voidable only.

Danforth v. Danforth, 111 Ill. 236
Dictum — nunc pro tunc entry upheld.

Motion to set aside a decree on the ground of fraud taken under advisement. Motion overruled after death of the moving party but by order entered nunc pro tunc. Question of void or voidable was, therefore, not in issue.

Pyatt v. Riley, 252 Ill. 36, 96 N. E. 570
Distinguished — decided on another point.

Suit commenced in name of partnership. Claim assigned to an individual and continued in the name of the partnership for his use. He then died, and his administrator was substituted and the case continued in the name of the partnership for the use of the administrator. In the meantime the partnership was dissolved by death of a partner. Held that the continuation of the suit for the use of the assignee was not improper, and the judgment was upheld.

Bushnell v. Cooper, 289 Ill. 260, 124 N. E. 521, 6 A. L. R. 1517
Dictum — estoppel of opposite party.

Separate maintenance suit was tried. Plaintiff then died. Thereafter decree was rendered in her favor. Defendant knew of death but did not raise the point. The court held that he was estopped to raise the point after the term ended, although the court did recognize the rule that divorce actions abate absolutely upon the death of one of the parties.

Stoetzell v. Fullerton, 44 Ill. 108
Dictum — joint parties.

This involved a collateral attack but on a judgment in favor of several plaintiffs, one of whom died before judgment. Court held that the surviving plaintiff had a sufficient interest in the cause of action to sustain the judgment.

Pfirshing v. Heitner, 91 Ill. App. 407
Dictum — direct attack.

This case was based entirely on the Illinois decision in Claflin v. Dunne, which in turn involved a direct and not a collateral attack.

Gilman v. Donavan, 53 Iowa 362
Dictum — attack barred by statute of limitation.

Judgment had become valid by running of statute of limitation against any attack.

Nelson v. Gray, 2 Greene 397 (Ia.)
Dictum — direct attack.

Arose on motion for new trial of a case where judgment was rendered against a defendant whom the record showed to be dead. Did not require the court to pass on the question whether the judgment was void..

Ratterman v. Apperson, 141 Ky. 821, 123 S. W. 1005
Dictum — direct attack.

Action was revived after death. Held that judgment after revivor was entirely regular.

Spalding v. Wathen, 7 Bush 659 (Ky.)
Dictum — plaintiff in error died pending appeal.

This case upholds the rule that death of plaintiff in error does not abate the appeal, but distinguishes between death of plaintiff or appellant, on the one hand, as compared with death of the defendant or appellee, on the other hand.

Case v. Rebelin, 1 J. J. Marsh 29 (Ky.)
Dictum — direct attack.

Arose on application for writ of error coram nobis, which was held to be the proper method of attack.

Mosely v. Morgan, 252 S. W. 117 (Ky.)
Dictum — estoppel of opposite party.

Plaintiff died after submission and before judgment. Defendant held to be estopped from attacking the judgment.

West v. Jordan, 62 Me. 484
Dictum — direct attack.

Judgment rendered in favor of deceased plaintiff without substitution. On application of administrator judgment vacated and judgment entered in his name as representative.

Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. D. 649
Dictum — direct attack.

Stockholder of bank complained about enforcement against him of a judgment which had been rendered

against the corporation after dissolution. Court held that no judgment could be entered against the dissolved corporation, but based its decision on a Maine statute which rendered the stockholder liable in any event.

Reid v. Holmes, 127 Mass. 326
Dictum — estoppel of opposite party.

Party who had recovered judgment against the deceased defendant attempted to proceed against the executors on the same cause of action. Held that until his former judgment was set aside he could not proceed. However, in that case the representatives of the deceased defendant elected to assent to the validity of the prior judgment. Case only holds that plaintiff who took judgment against dead defendant cannot sue executors on the same cause of action.

Stickney v. Davis, 17 Pick. 169 (Mass.)
Dictum — direct attack.

Representatives of a deceased defendant permitted to come in and vacate the judgment and be substituted.

Hildreth v. Thompson, 16 Mass. 191
In point — holding opposed to the texts.

Collateral attack in an action for rent. Plaintiff's title depended on judgment in another action rendered after defendant's death. Held that the judgment was utterly void and that plaintiff had no title and could not recover the rent.

Pourpore v. Stone & Ordean Wells Co., 132 Minn. 409, 157 N. W. 648
Dictum — party dead when action commenced.

Proceeding for widow's allowance was commenced after her death. The court having decided only the status of an order entered in such case, discussion of the situation where the party died after commencement of the action was dictum only.

Stocking v. Hanson, 22 Minn. 542
Dictum — estoppel of opposite party.

Representatives of a deceased party denied the right to

become parties to the proceeding on the ground that they were guilty of laches in presenting their application. Discussion of the question whether the judgment was void or voidable was not necessary to the decision.

Hayes v. Shaw, 20 Minn. 405
Distinguished — judgment in favor of deceased plaintiff.

Involved the additional proposition that it arose on demurrer to a petition which stated that the judgment had been duly given and made. The court held that the demurrer admitted that allegation. All discussion of the question void or voidable was unnecessary to the decision.

State v. Riley, 219 Mo. 667, 118 S. W. 647

Overruled by later Missouri decision, Cole v. Parker Co., 276 Mo. 220; 207 S. W. 749.

Kellogg v. Moore, 271 Mo. 189, 196 S. W. 15
Overruled by Cole case, supra.

Wardrob v. Leonard, 78 Nebr. 531, 111 N. W. 134, 126 Am. S. R. 619
Dictum — attack barred by statute of limitations.

Collateral attack on a decree of sale. Right to conduct the attack was barred by a Nebraska statute. Discussion of the question void or voidable unnecessary to the decision.

McCormick v. Paddock, 20 Nebr. 486, 30 N. W. 602
In point — supports the text.

McAlister v. Lancaster County Bank, 15 Nebr. 295, 18 N. W. 57
Distinguished — no issue of death involved.

Decree contested by an individual on theory he was insane when the decree was rendered and that no guardian appeared for him. Held the service of summons gave the court jurisdiction of him, sane or insane. If the decision is any authority at all, it would be authority for the discredited doctrine that a judgment is not void even though defendant was dead when the action was commenced.

Jennings v. Simpson, 12 Nebr. 558, 11 N. W. 880.
Distinguished — no judgment for or against dead defendant.

Collateral attack by an individual on an order which had disallowed his report as a receiver. His attack was based on the proposition that the plaintiff in the receivership action was dead when the order was entered. Court held that the order was an administrative matter and that the death of the plaintiff was immaterial.

Wood v. Watson, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541
Distinguished — judgment for dead defendant.

The court distinguishes clearly between a judgment against a dead defendant and a judgment in favor of a dead defendant. The court recognizes that there is a manifest reason why a judgment against a dead man may be avoided and set aside on the ground that the defendant having died there was no one to make a motion to revive the action or to substitute his representatives unless the plaintiff made that motion, and that the plaintiff, having failed to make the motion to substitute, cannot complain. The reason why an irregular judgment against a defendant can be complained of only by him is that he is presumed to be satisfied with the judgment unless he complains. It is otherwise, however, where he is dead at the time judgment is given because he cannot by any presumption be held to have assented to that judgment unless it was in his favor, in which event the Court considers that the defendant may safely be presumed to be satisfied with the judgment.

Therefore, the Court, while apparently holding that a judgment rendered after death is voidable only, carefully protects its decision against any unwarranted extension, and so rendered it is only authority for the proposition that a judgment in favor of a deceased defendant is not void, and it is not authority for the proposition that a judgment against a deceased defendant would be voidable only.

Knott v. Taylor, 99 N .C. 511, 6 S. E. 788, 6 Am. S. R. 547
In point — supports the text.

Lynn v. Lowe, 88 N. C. 478
Dictum — direct attack.

Decision only vacated judgment and substituted proper parties. Discusses the question of void and voidable at length, but not involved because the proceeding was a direct attack.

Burke v. Stokely, 65 N. C. 569
Dictum — direct attack.

Court sustains propriety of setting aside a judgment against a deceased defendant and permitting substitution of correct parties.

Swasey v. Antram, 24 Oh. St. 87
In point — supports the text.

Dows v. Harper, 6 Oh. 518, 27 Am. D. 270
Dictum — direct attack.

Jefferson v. Hicks, 33 Okla. 407, 126 P. 739
Dictum — direct attack.

This was not only a direct attack but the judgment in question was that of an appellate court which denied a motion to set aside that judgment and directed that the mandate be issued to the lower court and that the lower court take proper steps for revivor.

Mosley v. Southern Mfg. Co., 4 Okla. 492, 46 P. 508
In point — based on survival statute.

Collateral attack. Court squarely held that the judgment was voidable only, but the case is one where the cause of action clearly survived by virtue of the Oklahoma statute.

Mitchell v. Schoonover, 16 Or. 211, 17 P. 867, 8 Am. S. R. 282
Dictum — entry nunc pro tunc.

Approves of entry nunc pro tunc where case was submitted prior to death of plaintiff, and judgment thereafter rendered for him.

Murray v. Weigle, 118 Pa. 159, 11 Atl. 781
Distinguished — point not involved:

While this was a collateral attack on a judgment against a deceased defendant, the decision turned on the validity of proceedings in a guardianship which did not involve a judgment rendered after death.

Carr v. Townsend's Executors, 63 Pa. 202
Distinguished — judgment for a dead plaintiff.

Holding that the judgment was voidable only may be upheld on the theory that the defendant had assented to the entry by failing to suggest to the court the death of the plaintiff.

Yaple v. Titus, 41 Pa. 195, 80 Am. D. 604
Distinguished — judgment for or against a dead defendant not involved.

The judgment attacked was for the sale of property of a lunatic who died pending the sale proceedings. While the court discusses the validity of the order of sale the decision is based primarily on the proposition that the probate court had acquired jurisdiction of the property and that jurisdiction of the person of the insane man was not necessary to a valid sale and that the proceeding was one purely in rem.

Grossman's App., 102 Pa. 137
Dictum — direct attack.

Lanning v. Pawson, 38 Pa. 480
Dictum — direct attack.

At the request of a representative of a deceased defendant the court set aside a judgment entered on a warrant of attorney after the death of the party who signed the warrant.

Greenough v. Patton, 7 Watts 336 (Pa.)
Distinguished — does not involve the point.

Case merely holds that judgment against an executor by

name and without further proceeding is not a lien on the testator's real estate.

Warder v. Tainter, 4 Watts 270 (Pa.)
Dictum — point not involved.

In scire facias court held that jurisdiction of the person was not necessary and that the proceeding being one in rem the judgment on scire facias was voidable only.

Harrison v. McMurray, 71 Tex. 122, 8 S. W. 612
In point — Texas decision.

Howard v. McKenzie, 54 Tex. 171
In point — Texas decision.

McClelland v. Moore, 48 Tex. 355
In point — Texas decision.

Taylor v. Snow, 47 Tex. 462, 26 Am. S. R. 311
In point — Texas decision.

Milam County v. Robertson, 47 Tex. 222
In point — Texas decision.

Elliott v. Bastian, 11 Utah 452, 40 P. 713
Dictum — attack barred by limitation statute.

Court refused to modify or vacate a judgment on the ground that the time and method of attack was prescribed by statute, which had not been complied with, and said:

"It is unnecessary to discuss their (courts') power at common law or in the absence of statutory provisions."

Holt v. Thacher, 52 Vt. 592
Dictum — direct attack.

Ruling on a motion before judgment. Court permitted substitution of parties.

Neale v. Utz, 75 Va. 480
Distinguished — did not involve judgment against a deceased party.

Evans v. Spurgin, 11 Gratt. (52 Va.) 615, 6 Gratt. (47 Va.) 107, 52 Am. D. 105
Distinguished — did not squarely involve the question.

> Conflicting chains of title. Court held that claims under one chain of title were nullities because a common predecessor had first conveyed his title to the other chain. The court goes on to discuss a later judicial proceeding against the common predecessor and stated that those proceedings could not be attacked, but, having held that the common predecessor had previously conveyed his interest, the proceeding was therefore of no effect and discussion of it was unnecessary to the opinion.

Robinett v. Mitchell, 101 Va. 762, 45 S. E. 287, 99 Am. S. R. 928
In point — supports the text.

Alvis v. Saunders, 113 Va. 208, 74 S. E. 153
In point — supports the text.

King v. Burdell, 28 W. Va. 601, 57 Am. R. 687
In point — supports the text.

Watt v. Brockover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. S. R. 811
Distinguished — judgment in favor of deceased plaintiff.

Hotchkin v. Bussell, 46 Wash. 7, 89 P. 183
Distinguished — decided on another point.

> Plaintiff assigned to one Collins her right to purchase water front property from the State of Washington. Her assignee, Collins, appealed from the ruling of the Land Department on the right to purchase the land. The appeal was decided against him after his death. Plaintiff then began this separate action to set aside the ruling on the appeal, alleging that the ruling on the appeal was void and that actually Collins had held her interest in trust for her. The Washington court refused to set aside the ruling and referred to the void-voidable rule, but did not base its decision on the ground that the ruling on appeal was voidable only, but decided the case on the proposition that even though the ruling was set aside plaintiff would have

no standing because her right had been assigned and her rights as beneficiary did not appear and that she had no legal title. The decision was also based on the same reasoning as applied in the case of Green v. Watkins, where the rule was recognized that death of a plaintiff in error does not abate an appeal.

Green v. Cobden, 4 Scott 486, 36 E. C. L. 398 (England)
Dictum judgment entered nunc pro tunc.

This is one of the early English decisions which determines that a judgment nunc pro tunc may be entered where the case was fully tried before death and held under advisement until after death, and the case has no application to a judgment entered as of a day after death.

We submit that the texts are grossly in error when they say that the numerical weight of authority is in favor of the proposition that a judgment is voidable only, even though rendered after death, where the court once had acquired jurisdiction of the defendant. We submit that nine of the courts have squarely held that such a judgment is void and that only six courts have squarely held to the contrary; that two of the courts have held that the judgment is only voidable but have based their decisions either on survival statutes or on a complete misconception of the jurisdiction of courts (Texas). All the remaining decisions are distinguishable in one of the respects noted above.